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DOCKET NO. 04-00034

**CONSUMER ADVOCATE’S OBJECTION TO CHATTANOOGA GAS’S ATTEMPTED
SUBMISSION OF POST-HEARING AFFIDAVIT OF MICHAEL MORLEY AS PART
OF ITS PETITION FOR RECONSIDERATION**

Comes Paul G. Summers, Attorney General for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”), and hereby objects to the attempt of Chattanooga Gas to submit a post-hearing affidavit of Michael Morley as part of its Petition for Reconsideration. The Consumer Advocate also objects to any attempt to have Mr. Morley testify at the hearing. As grounds for its objection to the new affidavit and/or the testimony of Mr. Morley, the Consumer Advocate would state as follows:

1. The new affidavit seeks to introduce testimony and other evidence which were not part of the original contested case hearing and, therefore, are not a proper part of a Petition for Reconsideration.

2. If the testimony and evidence in the new affidavit are allowed, the Consumer Advocate will be deprived of its right to a fair hearing because it will be unable to adequately cross-

examine the affiant, particularly because no notice of such testimony was given by either the TRA or Chattanooga Gas. In fact, the notice for this hearing on the Petition for Reconsideration explicitly refers to "oral argument," not to testimony at the hearing. See Notice of Filing and Oral Argument, December 1, 2004, attached as **Exhibit 1**.

In filing this affidavit and proclaiming that the affiant will be ready to testify live if the affidavit is objected to, Chattanooga Gas has made it clear that it intends to use this procedure as a complete rehearing with witnesses, not a reconsideration. At no time, however, was the use of witnesses contemplated by the TRA or the Consumer Advocate. Accordingly, the affidavit of Mr. Morley should not be allowed and he should not be allowed to testify.

Moreover, it would be improper for the decision of the TRA in this reconsideration to track or follow in any way the arguments and positions in the Morley affidavit because that affidavit represents material that the Consumer Advocate will not be able to adequately challenge and cross-examine. Thus, if the TRA does accept or follow the Morley affidavit, the Consumer Advocate will have been deprived of its fundamental right to a fair hearing.

I. THE NEW AFFIDAVIT SEEKS TO INTRODUCE EVIDENCE THAT WAS NOT PART OF THE ORIGINAL HEARING AND, THEREFORE, THE NEW AFFIDAVIT SHOULD BE EXCLUDED

By Chattanooga Gas's own admission, the material it seeks to introduce through a new affidavit from Michael Morley is "new evidence." See Letter to Pat Miller, Chairman, from D. Billye Sanders, December 6, 2004 at page 1 ("As stated in its Petition for Reconsideration, CGC's request to introduce new evidence is for good cause because the methodology for calculating CGC's capital structure was not presented by any party to the proceeding, and therefore the data necessary

to calculate the average capital structure for AGLR for the attrition period is not part of the record.”) (emphasis added), attached as **Exhibit 2**. The TRA rules on Petitions for Reconsideration, 1220-1-2-.20 *et seq.*, however, specifically prohibit such new evidence. The only exception is for “good cause” shown, and Chattanooga Gas has made no such showing in this case. Furthermore, since the affidavit of Michael Morley was filed only a week before the hearing on the Petition for Reconsideration set for December 13, 2004, there is no way the Consumer Advocate could respond to an argument based on “good cause” or the TRA could rule on it before the hearing.

TRA Rule 1220-1-2-.20 (2)(c)-(d) provides as follows:

(c) the party seeking reconsideration may be allowed to present new evidence only if the party shows that good cause existed for the failure to introduce the new evidence at the original hearing, and the opposing party shall be allowed to present rebuttal proof if the party seeking reconsideration is allowed to present new evidence; and

(d) any new evidence allowed to be introduced by the party seeking reconsideration shall be limited to that described in the petition for reconsideration.

First, insofar as the material in the Morley affidavit is an explanation of how he calculated a capital structure, there can be no acceptable explanation as to why such material was not presented at the original hearing.

Furthermore, the Morley affidavit was not set forth in the original Petition for Reconsideration filed on November 4, 2004; in fact, the first time it was seen was some four weeks after the Petition, on December 6, 2004, and a mere week before the hearing. Accordingly, the new affidavit should be barred under sub-section (d) because it was not “described in the petition for reconsideration.”

Finally, even if the new affidavit were allowed, the Consumer Advocate must be allowed to

present rebuttal proof under sub-section (c) (“ . . . and the opposing party shall be allowed to present rebuttal proof if the party seeking reconsideration is allowed to present new evidence”). Given the lateness of the filing of the new affidavit (December 6th); the nearness of the hearing date (December 13th); and the fact that the Consumer Advocate’s witness expert witness, Dr. Brown, is not presently available to testify, the Consumer Advocate will not be able to present effective rebuttal testimony.

Finally, the TRA’s own notice for the hearing on the Petition for reconsideration made clear that the hearing was to consist of oral argument, not testimony by affidavit or live witness. The Notice of Filing and Oral Argument provides as follows:

Each side will be permitted thirty (30) minutes for oral argument. The panel also determined that any party desiring to make a filing in support of its position regarding the issues raised in the *Petition for Reconsideration* shall do so no later than Monday, December 6, 2004.

Notice of Filing and Oral Argument, December 1, 2004, attached as **Exhibit 1**.

This issue of filings outside the record has, of course, previously arisen in this case. As a result of e-mails and a letter with attempted testimony sent from Steve Lindsey, the Chattanooga Gas Vice-President, to the Directors, the Consumer Advocate was forced to write a letter to the Directors asking them to take no notice of the letters and e-mails sent after the decision in this case. See Letter to Honorable Pat Miller, Chairman, from Vance Broemel, November 19, 2004, attached as **Exhibit 3**. Subsequent to the receipt of this letter, Chairman Director Miller addressed this issue at the Conference of November 22, 2004 as follows:

CHAIRMAN MILLER: I vote aye. But I would like to, if I could, limit such oral arguments to the issues raised in Chattanooga Gas’ petition for reconsideration and further ask that there has been

some recent communication from Chattanooga Gas that are not part of the record, and I want to make sure that that--that we don't consider that--that we don't discuss that during oral argument or during our deliberations so we just --and I'd also like to set a date of December 13th for oral argument.

Transcript of Authority Conference, November 22, 2004, at pages 17-18.

Thus, the TRA clearly held that the hearing on the Petition for Reconsideration was to be confined to the "record." Chattanooga Gas, however, has cavalierly ignored this direction and has once again sought to improperly supplement the record.

In summary, Chattanooga Gas should not be allowed to present new evidence in the form of the Morley affidavit because it was not part of the original hearing. Furthermore, no good cause has been shown as to why the material in the affidavit was not included in the original hearing, nor is the affidavit part of the original Petition for Reconsideration. Accordingly, the TRA should exclude the Morley affidavit.

II. IF THE TESTIMONY AND EVIDENCE IN THE NEW AFFIDAVIT IS ALLOWED THE CONSUMER ADVOCATE WILL BE DEPRIVED OF ITS RIGHT TO A FAIR HEARING BECAUSE THE CONSUMER ADVOCATE WILL BE UNABLE TO ADEQUATELY CROSS-EXAMINE THE AFFIANT

Under Tennessee law, the Consumer Advocate is guaranteed the fundamental right to "cross-examine and impeach the source of information and to contradict the information" contained in any material or testimony that may affect the decision in this case. Tennessee Consumer Advocate v. Tennessee Regulatory Authority and United Cities Gas Company, 1997 WL 92079 (Tenn.Ct.App.). In filing the Morley affidavit and proclaiming that the affiant will be ready to testify live if the affidavit is objected to, however, Chattanooga Gas is seeking to introduce evidence which the

Consumer Advocate cannot adequately cross-examine or otherwise challenge. Accordingly, the use of the Morley affidavit or live testimony would negate the Consumer Advocate's right to a fair hearing.

At no time was the use of witnesses contemplated by the TRA or the Consumer Advocate. In fact, the notice for this hearing on the Petition for Reconsideration explicitly refers to "oral argument," not to testimony at the hearing. See Notice of Filing and Oral Argument, December 1, 2004, attached as **Exhibit 1**. Accordingly, the affidavit of Mr. Morley should not be allowed and he should not be allowed to testify.

Moreover, it would be improper for the decision of the TRA in this reconsideration to track or follow in any way the arguments and positions in the Morley affidavit because that affidavit represents material that the Consumer Advocate will not be able to adequately challenge and cross-examine. Thus, if the TRA does accept or follow the Morley affidavit, the Consumer Advocate will have been deprived of its fundamental right to a fair hearing.

CONCLUSION

For the foregoing reasons, the TRA should not allow the introduction of the Morley affidavit nor allow his live testimony. The TRA should uphold its Order of October 20, 2004, and deny Chattanooga Gas's Petition for Reconsideration.

RESPECTFULLY SUBMITTED,

Timothy C. Phillips
TIMOTHY C. PHILLIPS, B.P.R. # 012751
Senior Counsel

Vance L. Broemel
VANCE L. BROEMEL, B.P.R. # 11421
Assistant Attorney General
Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-3533

Dated: December 9, 2004

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been served via the methods indicated on this 9th day of Dec., 2004, to the following:

Via first-class U.S. mail, postage prepaid:


Dale Grimes
c/o Dale Grimes
Bass, Berry & Sims
AmSouth Center
315 Deaderick Street, Suite 2700
Nashville, TN 37238-3001

Chattanooga Gas Company
c/o Archie Hickerson
AGL Resources, Location 1686
P.O. Box 4569
Atlanta, GA 30302-4569

Henry Walker, Esq.
Boult Cummings, et al.
414 Union Street, #1600
Nashville, TN 37219-8062

Richard Collier, Esq.
General Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
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D. Billye Sanders, Esq.
Waller, Lansden, Dortch & Davis, PLLC
511 Union Street, Suite 2100
Nashville, TN 37219-1760


VANCE L. BROEMEL
Assistant Attorney General

80694

TENNESSEE REGULATORY AUTHORITY



Pat Miller, Chairman
Deborah Taylor Tate, Director
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460 James Robertson Parkway
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NOTICE OF FILING AND ORAL ARGUMENT

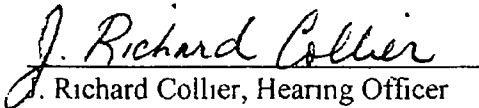
DOCKET: 04-00034

IN RE: Petition of Chattanooga Gas Company for Approval of Adjustment of
its Rates and Charges and Revised Tariff

DATE: December 1, 2004

This matter came before Chairman Pat Miller, Director Deborah Taylor Tate and Director Sara Kyle of the Tennessee Regulatory Authority, the voting panel assigned to this Docket, at a regularly scheduled Authority Conference held on November 22, 2004 for consideration of the *Petition for Reconsideration* filed by Chattanooga Gas Company on November 4, 2004. During the November 22 Conference, the panel granted the *Petition for Reconsideration* and voted to set this matter for oral argument on the merits of the *Petition for Reconsideration* during the **Authority Conference scheduled for December 13, 2004 at 1:00 p.m.** Each side will be permitted thirty (30) minutes for oral argument. The panel also determined that any party desiring to make a filing in support of its position regarding the issues raised in the *Petition for Reconsideration* shall do so no later than **Monday, December 6, 2004.**

FOR THE TENNESSEE REGULATORY AUTHORITY,


J. Richard Collier, Hearing Officer

cc Original in Docket File
Parties to this Docket



WALLER LANSDEN DORTCH & DAVIS, PLLC

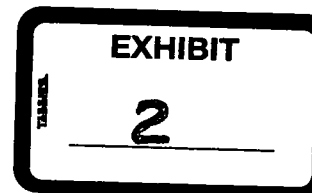
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D. Billye Sanders
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December 6, 2004

VIA HAND DELIVERY

Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37219

Re: Petition of Chattanooga Gas Company for Approval of
Adjustment of its Rates and Charges and Revised Tariff
Docket Number 04-00034

Dear Chairman Miller:

Pursuant to the TRA's Notice allowing filings in support of issues raised regarding Chattanooga Gas Company's ("CGC's") Petition for Reconsideration in the above referenced Docket, enclosed are the original and 13 copies of the Affidavit of Michael Morley which is filed in support of CGC's Petition for Reconsideration.

CGC also respectfully requests that the TRA take official notice of the Form 10-Qs of AGL Resources, Inc. ("AGLR") for the quarters ended March 31, 2004, June 30, 2004 and September 30, 2004, which are on file publicly with the Securities and Exchange Commission and available on its website. In addition, CGC reiterates its request that the TRA take official Notice of the entire record in TRA Docket No. 97-00982 (Petition of Chattanooga Gas Company to Place into Effect a Revised Natural Gas Tariff), to the extent such official notice has not already been taken. (See CGC's Petition for Reconsideration footnote 5 on page 4.)

As stated in its Petition for Reconsideration, CGC's request to introduce new evidence is for good cause, because the methodology for calculating CGC's capital structure was not presented by any party to the proceeding, and therefore the data necessary to calculate the average capital structure for AGLR for the attrition

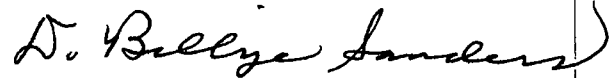
December 6, 2004

Page 2

period is not in the record¹. Further, the TRA relied on information in Docket No. 97-00982 in its findings in this current docket and thus it is appropriate for the TRA to take official notice of the record in that docket.

Attached to the Affidavit is a notice to the parties filed pursuant to T.C.A. Section 4-5-313(2) and (4). Pursuant to T.C.A. Section 4-5-313(3) the TRA may admit affidavits not submitted in accordance with this Section to prevent injustice. T.C.A. Section 4-5-313(2) allows the parties 7 days after the delivery of the affidavit to inform the proponent, CGC, that it wishes to cross examine the affiant. Because the seventh day after delivery will be December 13, 2004 and oral argument is scheduled for December 13, 2004, CGC has requested that the parties notify it by Wednesday, December 8, if they wish to cross examine the affiant. If cross examination is requested by a party, the TRA should provide an opportunity for cross examination of the affiant prior to oral argument on the merits.

Sincerely,



D. Billye Sanders
Attorney for Chattanooga Gas
Company

DBS/hmd

cc: Parties of Record
Archie Hickerson
Elizabeth Wade, Esq.
Michael Morley
Steve Lindsey
L. Craig Dowdy, Esq.

¹ Petition for Reconsideration p 11

STATE OF TENNESSEE

Office of the Attorney General



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November 19, 2004

Honorable Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

EXHIBIT

3

Re Petition of Chattanooga Gas Company for Approval of Adjustment of Its
Rates and Charges and Revised Tariff-TRA No 04-00034

Dear Chairman Miller

On Wednesday, November 17, 2004, the Consumer Advocate became aware of an e-mail sent to the Directors of the Tennessee Regulatory Authority ("TRA") regarding a planned stock offering by AGL Resources, Inc., the parent of Chattanooga Gas Company. A copy of the e-mail, dated November 16, 2004, is attached to this letter. Chattanooga Gas is currently involved in a rate case proceeding before the Authority, Docket No 04-00034, in which the Authority has made a decision and issued a written order after a contested case on the merits in which live testimony was taken. On November 4, 2004, Chattanooga Gas filed a Petition for Reconsideration in which it asked the TRA to, in effect, reverse its decision.

The e-mail sent by Chattanooga Gas provides information that could affect a decision about the capital structure of Chattanooga Gas, which was a major issue in the rate case. Given the fact that the record is closed in this case, there is, however, no way for the Consumer Advocate to respond to this new information. The Consumer Advocate therefore asks that the TRA Directors in the pending Chattanooga Gas rate case take no notice of the e-mail.

In addition, the Consumer Advocate hereby asks the TRA Directors to disregard the personal letter dated November 4, 2004, from Steven Lindsey, Vice-President of Chattanooga Gas, to the Directors in which he requests the Directors to reverse their decision on the capital structure of Chattanooga Gas. This letter was filed simultaneously with Chattanooga Gas's Petition for Reconsideration. The Consumer Advocate is fully ready and able to respond to the legal arguments raised in the Petition for Reconsideration, but cannot respond to what is actually an attempt at

additional testimony from Mr Lindsey, who was a witness in the proceeding. Accordingly, as with the e-mail, the Consumer Advocate asks the TRA Directors to take no notice of Mr. Lindsey's attempt at new testimony filed after the close of the record

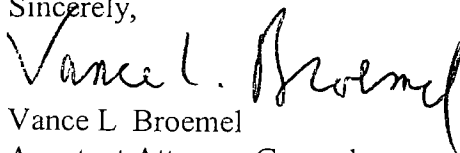
Similarly, the Petition for Reconsideration contains an excerpt from testimony filed in a previous rate case, Docket No 97-00982 (the excerpt is Exhibit No 1 to the Petition). Since the record is closed, the Consumer Advocate cannot respond to this attempt at new testimony. It is, of course, notoriously difficult to "unring the bell" but the Consumer Advocate must also ask the TRA Directors to disregard this further attempt at additional testimony

Given these attempts at factual and testimonial filings made by Chattanooga Gas after the close of the hearing, the Consumer Advocate has grave concerns about the state of the record in this case. In particular, the Consumer Advocate is concerned with safeguarding its fundamental right to "cross-examine and impeach the source of information and to contradict the information" contained in any material or testimony that may affect the decision in this case. Tennessee Consumer Advocate v Tennessee Regulatory Authority and United Cities Gas Company, 1997 WL 92079 (Tenn Ct. App.). If the e-mail, personal letter, and testimony from another case are not disregarded, that fundamental right will have been violated.

In conclusion, the record in this matter is and should remain closed. Both parties were aware of the dates by which testimony was to be submitted. If Chattanooga Gas wished for more time to prepare for and add to its case, they could have asked for it, along with an agreement not to put its rates into effect at the end of the six month period after filing. Chattanooga Gas's attempt to supplement the record at this time is unwarranted and inappropriate and endangers the Consumer Advocate's right to a fair hearing.

Thank you for your attention to these matters

Sincerely,



Vance L. Broemel
Assistant Attorney General
(615) 741-8733

attachment
cc. Counsel of record
Director Kyle
Director Tate
Director Jones

TENNESSEE REGULATORY AUTHORITY



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NOTICE OF FILING AND ORAL ARGUMENT


DOCKET: 04-00034

IN RE: Petition of Chattanooga Gas Company for Approval of Adjustment of
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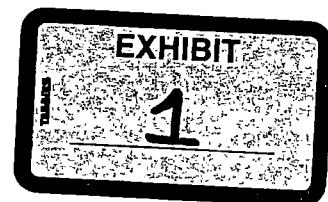
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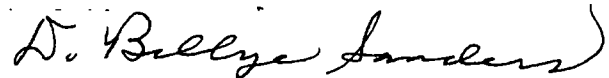
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November 19, 2004

Honorable Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505



Re Petition of Chattanooga Gas Company for Approval of Adjustment of Its
Rates and Charges and Revised Tariff-TRA No 04-00034

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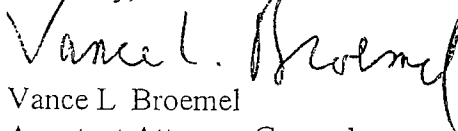
Similarly, the Petition for Reconsideration contains an excerpt from testimony filed in a previous rate case, Docket No. 97-00982 (the excerpt is Exhibit No. 1 to the Petition). Since the record is closed, the Consumer Advocate cannot respond to this attempt at new testimony. It is, of course, notoriously difficult to "unring the bell" but the Consumer Advocate must also ask the TRA Directors to disregard this further attempt at additional testimony.

Given these attempts at factual and testimonial filings made by Chattanooga Gas after the close of the hearing, the Consumer Advocate has grave concerns about the state of the record in this case. In particular, the Consumer Advocate is concerned with safeguarding its fundamental right to "cross-examine and impeach the source of information and to contradict the information" contained in any material or testimony that may affect the decision in this case. Tennessee Consumer Advocate v. Tennessee Regulatory Authority and United Cities Gas Company, 1997 WL 92079 (Tenn. Ct. App.). If the e-mail, personal letter, and testimony from another case are not disregarded, that fundamental right will have been violated.

In conclusion, the record in this matter is and should remain closed. Both parties were aware of the dates by which testimony was to be submitted. If Chattanooga Gas wished for more time to prepare for and add to its case, they could have asked for it, along with an agreement not to put its rates into effect at the end of the six month period after filing. Chattanooga Gas's attempt to supplement the record at this time is unwarranted and inappropriate and endangers the Consumer Advocate's right to a fair hearing.

Thank you for your attention to these matters.

Sincerely,



Vance L. Broemel
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attachment
cc: Counsel of record
Director Kyle
Director Tate
Director Jones